

Date: 20070222

Docket: IMM-3688-06

Citation: 2007 FC 198

Ottawa, Ontario, the 22nd day of February 2007

Present: the Honourable Mr. Justice de Montigny

BETWEEN:

MAXIMO FERNANDO TORRES LOPEZ AND ANA JOAQUINA BERRIOS ALDANA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are seeking judicial review of a decision by the Refugee Protection Division (the RPD) on June 9, 2006. The panel came to the conclusion that Mr. Lopez and Ms. Aldana were not “Convention refugees”, in the words of section 96 of the *Immigration and Refugee Protection Act* (the Act), or “persons in need of protection” under section 97 of that Act.

[2] In addition to operating a Internet café with his wife in Lima, Mr. Lopez also provided technical support in the data processing field to customers of a business for which he was working. His brother put him in touch with an opposition senator who wanted repair work done to his

computer, and in March 2004 he agreed to perform the necessary operations to eliminate a virus which had settled in his hard disk. That was when Mr. Lopez's problems began.

[3] Seeking to ensure that the work done had in fact resolved the problem without affecting the files and programs originally found on the hard disk, Mr. Lopez decided to open a few files. This was when he saw child pornography scenes involving, among others, the senator's 14-year-old niece and other girls aged 13 to 16. Unsure what to do, Mr. Lopez consulted his brother, who advised him to wait until the senator returned from a trip so as to ensure that he was in fact the only user of the computer.

[4] As arranged, Mr. Lopez and his brother went to meet with the senator on his return and gave him the computer. When Mr. Lopez told him what he had found when he opened certain files, the senator got angry and stated that it was a plot orchestrated by a woman who was accusing him of sexual harassment. He then pointed a weapon at the two brothers and threatened to kill them if they revealed anything which might incriminate him. He also ordered them to give him back all of the material in their possession which might be used as evidence against him.

[5] Mr. Lopez gave the senator one of the two copies he had made, but decided to keep the other one. Mr. Lopez's brother consulted a friend who was a police officer to ask his advice, and the latter asked for a few days to think the matter over. In the meantime, during the night of April 1, 2004, three police officers burst into the Lopezes' Internet café and demanded that Mr. Lopez give them the other computer copies in his possession. When he stated that he did not

have any, he was severely beaten, and his wife was also hit. Fearing for his wife's life, Mr. Lopez finally told the police that his cousin had the other copy of the compromising computer files.

[6] When the police left, Mr. Lopez went to assist his wife, who ultimately lost the child that she was carrying. He then telephoned his cousin's wife to tell her of the information that he had just given to the police. His cousin, who had not yet returned home on the evening in question, was later found murdered.

[7] Feeling sure that the police would be back, Mr. Lopez and his wife decided to close up their business and to move into the Lima suburbs, in the hope that things would settle down. However, in June 2004, Mr. Lopez learned from his brother, who had himself been tortured and beaten, that the police knew where he was hiding. The couple decided to move again, this time to Mr. Lopez's sister's house. They obtained a visa for Canada on June 29, 2004.

[8] Mr. Lopez and Ms. Aldana tried to keep out of sight and lived in hiding during the months that followed. However, when they learned that the police had gone to their business and had seized all of the computers, they decided to flee their country and to seek refuge in Canada on August 27, 2004.

[9] In their Personal Information Form, they added that Mr. Lopez's sister received a visit from the police in late February 2005: they asked her where they could find her brother and allegedly even stole her car. Mr. Lopez's brother-in-law was also allegedly attacked by the police.

IMPUGNED DECISION

[10] The identity and citizenship of the applicants was not questioned, nor was their credibility. Nevertheless, the RPD concluded that Mr. Lopez and Ms. Aldana were not refugees or persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act* (the Act), for the following two reasons.

[11] First, the RPD stated that, in its opinion, there was no nexus between the applicants' alleged fear of persecution, namely that occasioned by the death threats made by the corrupt senator, and one of the five grounds mentioned in the Convention, namely race, religion, nationality, membership in a particular social group, or political opinion. Though it acknowledged that the applicants had been the victims of a criminal act and violence, this did not suffice to link the Government of Peru with a agent of persecution. In the view of the RPD the commission of a criminal offence does not support a conclusion that the machinery of the state, government and policy were involved. Consequently, "any future reporting of this criminal behaviour, namely child pornography and the use of violence to intimidate, cannot constitute the expression of a political opinion".

[12] Further, the RPD also concluded that the applicants had not discharged their burden of showing in a clear and convincing way that the Government of Peru was unable to protect them. The panel noted that the applicants had not reported the acts of violence and threats made against them to the authorities. According to the RPD, the evidence did not indicate that all of the police forces in Peru were conspiring with the politician. In fact, the panel had difficulty understanding

how there could be a perception of corruption so widespread as to protect “a corrupt politician who has gone so against the dominant values of the country—Peru”.

[13] Finally, the RPD was of the opinion that fear of and loss of confidence in state institutions and the forces of law and order were not reasonable justifications for refusing to seek state protection. Based on the documentary evidence, the panel was of the view that Peru was a multi-party republic in which free and democratic elections had been held in 2001 and that the situation was not one of a complete breakdown of the state apparatus. Though it acknowledged that Peru was facing a problem with corruption, the RPD emphasized that “the state is showing a true desire to fight it and has introduced considerable actions, accusations and charges as a way to sanction this wrongdoing”.

[14] Accordingly, Mr. Lopez and Ms. Aldana are seeking judicial review of this negative decision in this Court. For the reasons set out in the paragraphs that follow, I am of the opinion that their appeal must be dismissed.

ANALYSIS

[14] From the outset, it should be noted first that the applicants did not seriously question the RPD’s conclusion that they could not rely on section 96 of the Act, in view of the absence of any nexus between their alleged fear of persecution and one of the five grounds stated in the Convention. This conclusion was well founded, since nothing in the evidence showed that Mr. Lopez was motivated by political considerations or that he wished to attack the senator for his

opinions: *Stefanov v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 954 (QL); *Yoli v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1823 (QL).

[15] The only issue before this Court, therefore, is whether the RPD erred in concluding that the applicants had not succeeded in establishing that the Government of Peru was unable to protect them. In this regard, it is now well settled that the applicable standard of review is that of reasonableness. Consequently, it is only where none of the arguments put forward by the RPD in support of its decision can stand up to somewhat probing examination that judicial review can be allowed: see *inter alia Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193; *Perez Burgos et al. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537; *Quevedo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1264; *Garcia Villasenor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1080.

[16] The applicants argued that the RPD had erred by not analyzing their personal situation and by not taking into account the evidence that they had presented to explain their decision not to file a complaint with the authorities. Their counsel also made an effort to show that the RPD had applied too high a standard by requiring that all of the forces of law and order be accomplices of the senator and that the country be in a complete state of breakdown for it to conclude that Peru was unable to protect them.

[17] This Court has had occasion to rule several times in recent years on all aspects of state protection. It is increasingly evident, as my colleague Luc Martineau J. made quite clear in *Viguera Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, that the legislative and

regulatory framework, limiting though it may be, cannot establish, any more than good intentions can, that the state is in a position to protect its citizens and to ensure that their rights are respected. This intention must be reflected in specific acts and tangible results. On the other hand, as I wrote at paragraph 15 of *Garcia Villasenor v. Canada (Minister of Citizenship and Immigration)*, *supra*, “it will not suffice for a refugee status claimant to offer evidence that one or more police officers refused to act on his complaint, or that an investigation led nowhere in similar circumstances”.

[18] In the case at bar, the issue is whether it was unreasonable for the applicants not to file a complaint. That kind of issue cannot be decided in the abstract. The Court must necessarily take into account the reasons that led the claimants not to resort to the forces of law and order, the situation generally existing in the country and in the specific area where the applicant was living, the response given in similar situations, the identity of the persons responsible for the persecution, and any other special circumstances which might affect the state’s ability to protect one of its nationals. As my colleague Judith Snider J. explained in *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 944, at paragraph 8:

In my view, whether it is objectively unreasonable for the claimant not to have sought the protection of home authorities invites the Board to weigh the evidence before it and make a finding of fact. For example, although the agent of persecution might be a stage agent, the facts of the case might suggest that purely local or rogue elements are at work and that the state in question is democratic and offers protection to victims similarly situated to the claimant. It might, therefore, be objectively reasonable to expect a claimant to seek protection. In other instances, the identity of the state agent and documentary evidence of country conditions might mean that state protection would not be reasonably

forthcoming and, therefore, the claimant is not expected to have sought protection.

[19] I am of the opinion that that the RPD, in view of the evidence that was before it, could reasonably conclude that the applicants had not discharged their burden of showing that the Peruvian government was unable to protect them. It is true that the panel may have given the impression that the bar was very (too) high when it stated that “no evidence was submitted allowing the panel to determine that the entire police force was conspiring with the politician” and that Peru was not in a state of chaos and complete breakdown. The fact remains that Mr. Lopez and his wife never even gave the authorities of their country a chance to protect them.

[20] The applicants alleged that they did not file a complaint because they feared for their lives and because they believed that all of the police were corrupt. This clearly could not be a reasonable excuse for not contacting the authorities, especially when very incriminating material evidence is available for use against the person who is to be subject of the complaint. I further note that the senator in question appears to be isolated and represents the opposition rather than the government. Even more important, however, is that the evidence was that the senator in question had been the subject of several complaints of misrepresentation and sexual harassment. Not only were these complaints reported in the media, but it appeared they were also considered at various political levels. This all suggests that the senator perhaps did not have all the influence and power ascribed to him. In any event, it seems clear that other persons did not fear for their lives when they openly denounced the senator’s actions.

[21] Moreover, the documentary evidence in the national binder on Peru is mixed, as one might expect. Predictably, the applicants emphasized the fact that several inquiries and proceedings relating to corruption, extortion and murder committed by the police took time to be completed, whereas the respondent saw this as evidence that the Peruvian authorities were taking these problems seriously and acting to put an end to them. It is true that the RPD could have made a more extensive and detailed analysis of the evidence and it was undoubtedly improper to require evidence of a complete breakdown of the state. However, in view of the unclear nature of the documentary evidence and the absence of any indication that contrary evidence was systematically disregarded, I am of the opinion that the RPD's conclusion was not unreasonable.

[22] In short, we are not dealing here with a situation in which it was unreasonable to expect the applicants to take action to alert the Peruvian authorities. Although I sympathize with the applicants' problems and the difficult experience which they had to go through, we should never lose sight of the fact that a refugee protection claim in a state which is a signatory to the Convention must always be a solution of last resort. Assaults and threats by a few police officers did not exempt the applicants from having to file complaints with the proper authorities in the particular circumstances of this case. Although the RPD could have provided better reasons for its decision and may have shown itself too demanding as to what must be established to prove that the state is unable to protect its nationals, I am of the opinion that, in these circumstances, the errors were not fatal to its decision and do not warrant the matter being referred back for reassessment.

[23] Therefore, for all of these reasons, I dismiss this application for judicial review. No serious question of general importance was submitted for certification.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. There is no serious question of general importance to be certified.

“Yves de Montigny”

Judge

Certified true translation
Mavis Cavanaugh

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3688-06

STYLE OF CAUSE: MAXIMO FERNANDO TORRES LOPEZ
and
ANA JOAQUINA BERRIOS ALDANA

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v.

THE MINISTER OF CITIZENSHIP AND
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PLACE OF HEARING: Montréal

DATE OF HEARING: February 13, 2007

REASONS FOR ORDER BY: the Honourable Mr. Justice de Montigny

DATED: February 22, 2007

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